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IN THE

Supreme Court of the United States

NO. 1038

PLAZA LIQUOR STORE, INC.

Petitioner

VS.

CITY OF ATLANTA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

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PLAZA LIQUOR STORE, INC.	]
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Petitioner	]
	]
vs.	] NO.....
	]
CITY OF ATLANTA	]
	]
Respondent	]

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above entitled case on February 4, 1965.

OPINIONS BELOW

The opinion of the Trial Judge is not officially reported, but is reprinted as "Appendix A" hereof. The opinion of the Supreme Court of Georgia is not yet officially reported, but is reprinted as "Appendix B" hereof.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 4, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3). There is no Motion For Rehearing pending in said Court.

QUESTION PRESENTED

Whether a municipality in the guise of regulating the retail liquor business may establish package store areas which result in a change of use of petitioner's real estate without according due process provisions of the United States Constitution to Petitioner, prior to changing such use.

STATUTES INVOLVED

FIFTH AMENDMENTS TO THE CONSTITUTE OF THE UNITED STATES

"*Indictment, punishment, etc.* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"*Municipalities and counties may adopt regulations and determine location.*—Nothing in this Chapter shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Chapter. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or

retail business licensed by them. (Acts 1937-38, Ex. Sess., pp. 103, 111.)" Also codified in the Georgia Code, Annotated, as § 58-1028.

The ordinance in controversy, for purposes of brevity, is attached hereto as "Appendix C."

STATEMENT OF THE CASE

On the 2nd day of July, 1964, plaintiff filed an action in Fulton Superior Court against the City of Atlanta, as twice amended, alleging in substance that plaintiff was the owner of certain real estate which, for the past six (6) years had been used exclusively as a retail liquor store. At all times material to this suit, plaintiff had an investment in stock, fixtures and real estate of approximately NINETY THOUSAND DOLLARS ($90,000.00) in said premises. Because this property was zoned as C-1 and for retail purposes, it had a fair market value of approximately FIFTY THOUSAND DOLLARS ($50,000.00). Said property was so zoned and used for more than six (6) years prior to the filing of this action. Plaintiff holds no retail liquor license.

On March 23, 1964, the defendant enacted an ordinance which zoned real estate within defendant city as "Package Store Areas." No whisky is permitted to be sold at retail upon any real estate located within the City of Atlanta unless such real estate is located within a "Package Store Area."

Although plaintiff's property was in existence as a retail liquor store on the effective date of said ordinance and had been in existence for more than six (6) years prior to the enactment of same and met all the other criteria established by the terms of said ordinance. Petitioner's property was not included among those properties which were zoned as "Package Store Areas" in §§ 1, 2, 3, 4, 37, 53, 54, and 59 in said ordinance. Defendant municipality has advised plaintiff that it would not permit it to sell or lease said store for retail liquor sales, since it was not included within the "Package Areas" defined in its ordinance.

By the enactment of said ordinance and its interpretation thereof, defendant municipality is interfering with plaintiff's lawful use and occupancy of its premises and has diminished said property's leasehold value from SIX HUNDRED DOLLARS ($600.00) per month to TWO HUNDRED FIFTY DOLLARS ($250.00) per month, and diminished the fair market value of said real estate from FIFTY THOUSAND DOLLARS ($50,000.00) to THIRTY THOUSAND DOLLARS ($30,000.00). When defendant city enacted the foregoing ordinance, and especially § § 1, 2, 3, 4, 37, 53, 54, and 59 thereof, it did so without notice or opportunity to be heard of any kind, and plaintiff was thus deprived of due process of law, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property except by due process of law.

The relief sought was in substance that § § 1, 2, 3, 4, 37, 53, 54, and 59 of said ordinance be declared null and void, that plaintiff's property be restored to its zoning status prior to the enactment of said ordinance, that defendants be temporarily and permanently restrained from interfering with plaintiff's right to sell or lease said property for retail liquor purposes.

Respondent filed a general demurrer and motion to dismiss petitioner's complaint, as above stated, and the Trial Court on October 27, 1964, entered a written order sustaining said motion to dismiss. Thereafter, plaintiff, in the time and manner provided by law, appealed said judgment to the Supreme Court of Georgia, which on February 4, 1965, in a written opinion, affirmed the judgment of the Trial Court, thus terminating the litigation adversely to petitioner.

TIME AND MANNER IN WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Petitioner, in its original complaint, alleged and relied upon the Fifth and Fourteenth Amendments to the Constitution of the United States. (See Paragraph 11 of

original complaint.) The Trial Judge considered the entire complaint and when it sustained respondent's motion to dismiss, necessarily ruled that respondent's actions were not in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. Petitioner again insisted upon said constitutional provisions in its Bill of Exceptions to the Supreme Court of Georgia on the grounds that said judgment was contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States. (See Page 1, Petitioner's Bill of Exceptions.)

The Supreme Court of Georgia on Page 5 of its opinion held: "The allegations of this count do not show that the plaintiff was denied due process."

REASONS FOR GRANTING THE WRIT

1.

This case presents a question of great public importance among the several states, the question being whether under the guise of regulating the retail liquor business a municipality may ignore the due process provisions of the United States Constitution. It is petitioner's position that it is engaged in a legal business, which is subject to reasonable regulation by state and municipal authorities, but that such agencies cannot deny it basic constitutional rights. The court below, however, holds that due process does not apply in any wise to petitioner's situation, since a municipality has the right under its police power to deny due process, in regulating the retail liquor business.

2.

The opinion of the court below is in direct conflict with a decision of the United States Court of Appeals for the Fifth Circuit in the case of *Mrs. Lola Hornsby v. Ivan Allen, Mayor of the City of Atlanta,* 326 Fed. 2d. 605, (attached hereto as "Appendix D", in which case the court held, due process as provided in the United States Constitution, applies to regulation of the retail liquor business. The Court said in part:

"Since licensing consists in the determination of factual issues and the application of legal criteria to them — a judicial act — the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see *Tadano v. Manney*, 169 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941). Although strict adherence to the common-law rules of evidence at the hearing is not required, see *Crowell v. Benson*, 285 U.S. 22, 46 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, *Morgan v. United States*, 304 U.S. 1 (1935), to present evidence to support their contentions, see id. at 18, and to cross-examine witnesses for the other side, *Reilly v. Finkus*, 338 U.S. 269 (1949). Thus it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party. *Southern Stevedoring Co. v. Voris*, 190 F. 2d 275 (5th Cir. 1951); see *Chin Quong Mew v. Tillinghast*, 30 F. 2d 684 (1st Cir. 1929). A fortiori, the deciding authority may not base its decision on evidence which has not been specifically brought before it, *United States v. Abilene & So. Ry.*, 265 U.S. 274 (1924); the findings must conform to the evidence adduced at the hearing, *Tadano v. Manney*, 160 F. 2d 665 (9th Cir. 1947). Furthermore, the Supreme Court has said that an administrative order 'cannot be upheld merely because findings might have been made and consideration disclosed which would justify its order.' . . . There must be a responsible finding."

On April 3, 1964, the United States Court of Appeals for the Fifth Circuit denied a motion for re-hearing filed by the City of *Hornsby v. Allen*, et. al, (attached hereto as "Appendix E"), and upon the question of due process, said:

> "The liquor business is like any other business in that the state is limited in its regulation of it by due process and equal protection requirements although the peculiar nature of the business warrants the imposition of severe limitations on liquor traffic and tight restrictions on those persons engaged in it. In answer to appellees' suggestion that some rights, such as the right to practice law in a state court, are privileges not protected by the Constitution, we call attention to *Konigsberg v. State Bar*, 353 U.S. 252 (1957)."

There are thus two conflicting opinions upon the same subject-matter within the Fifth Circuit. The court's opinion and judgment in *Hornsby v. Allen*, supra, is reprinted as "Appendix D" hereof.

CONCLUSION

It is respectfully submitted that the considerations hereinbefore set forth call for the exercise by this court of its review powers to the end that the confusion created by the decision of the court below be resolved. It is therefore respectfully submitted that this Petition for Certiorari should be granted.

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that a copy of the within Petition for Certiorari was served upon Mr. Henry Bowden, Attorney of record for City of Atlanta, by depositing a copy of same in the United States Mail, properly franked to his address of record, 1114 William-Oliver Bldg., Atlanta, Ga.

This 30 day of March, 1965.

ROBERT L. MITCHELL, *Attorney*

"APPENDIX A"

PLAZA LIQUOR STORE, INC.
V.
CITY OF ATLANTA
CASE NO. B-6638
FULTON SUPERIOR COURT

O R D E R

The defendant's general demurrer as renewed to Counts one and two of the plaintiff's petition as amended by plaintiff's first and second amendment having come on before this Court for a hearing and argument and briefs of attorneys for both parties having been heard thereon and considered, it is hereby ORDERED and ADJUDGED that said general demurrers as renewed to Counts one and two be and the same are hereby sustained and the plaintiff's said petition as amended is hereby dismissed.

This October 27, 1964.

JEPTHA C. TANKSLEY,
Judge, Superior Court,
Atlanta Judicial Circuit

"APPENDIX B"

706

Decided: Feb. 4, 1965

In the Supreme Court of Georgia

22778. PLAZA LIQUOR STORE, INC.

v.

CITY OF ATLANTA

1. Count one failed to allege a cause of action against interference with the use of plaintiff's premises as a retail liquor store since the ordinance under which the City acted was authorized by the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Ga. L. 1937-38, Ex. Sess., p. 103) and by the City's charter police power (Ga. L. 1874, p. 116).

2. Count two did not state a cause of action for the continued use of plaintiff's premises as a retail liquor store under section 53 of such ordinance because the plaintiff was not an existing retail liquor store on the effective date of the ordinance so as to come within that section.

GRICE, Justice. The petition of a corporate liquor store, seeking to enjoin a city from interfering with the use of its property for liquor store purposes was held subject to the city's general demurrers and was dismissed, thus bringing about this review. Plaza Liquor Store, Inc., filed such petition against the City of Atlanta in the Superior Court of Fulton County.

Count one, insofar as material here, made the following allegations. The plaintiff owns real estate which has been zoned and used for the past six years as a retail liquor store. The defendant City in March 1964 enacted an ordinance, copy attached, purporting to zone certain real estate as "Package Store Areas," which, under such ordinance, are the only places where retail liquors may be sold. Although the plaintiff existed on the effective date of the ordinance and met all criteria established thereby, it was not included in the package store areas provided

by the ordinance. Also, the City refuses to treat the plaintiff as a non-conforming use under such ordinance and will not permit it to sell or lease its premises for the sale of retail liquors because it was not included in such package store areas. The City, by its enactment and interpretation of said ordinance, is interfering with plaintiff's use of its property and is diminishing its value in specified amounts.

The plaintiff has suffered and will continue to suffer irreparable injury unless the City is enjoined and unless designated sections of the ordinance are declared null and void. The City enacted such ordinance without providing the plaintiff any notice or opportunity to be heard, in violation of the due process clauses of the State and Federal Constitutions and without complying with the requirements of two state zoning statutes (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). The City, by enacting this ordinance, is attempting to zone and alter the use of plaintiff's premises without authority of law.

The prayers included injunctive relief against the illegal zoning of plaintiff's property so as to prohibit the retail sale of liquors thereon and against interference with plaintiff's right to lease its premises for such purpose; declaration that specified provisions of the ordinance are null and void; and restoration of plaintiff's property to its prior zoning status.

Count two adopted the allegations of count one as to plaintiff's property, the City's enactment of the 1964 ordinance, the omission of plaintiff from the package store areas of such ordinance, the City's refusal to treat plaintiff as a non-conforming use or to allow it to sell or lease its premises for liquor store purposes, the City's continued interference with plaintiff's use of its own property, the diminishing value of its property due to such interference and the need for injunctive relief. In addition, count two alleged that the use of the plaintiff's property for retail liquor sales should be permitted to continue as a non-conforming use under such ordinance, but the City arbitrarily and illegally refuses to do so;

and that in September 1963 the State Revenue Commissioner revoked the plaintiff's retail liquor license and since that time the plaintiff has not been licensed to conduct a retail liquor store on its premises. The prayers of this count included injunctive relief against the City's interference with the sale or lease of the plaintiff's property for use as a retail liquor store.

1. As we construe it, count one asserts that the ordinance, particularly sections 1, 2, 3, 4, 37, 53, 54 and 59, is void because the City failed to comply with the requirements of two state statutes pertaining to the zoning of property (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). However, zoning statutes are not applicable here.

What is applicable is the authority given the municipalities of this state to regulate the retail sale of liquor within their boundaries.

The Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquor (Ga. L. 1937-38, Ex. Sess., p. 103) provides as follows: "Nothing in this Act shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Act. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them." § 9(c), p. 111; Code Ann. § 58-1028.

The charter of the City of Atlanta gives the City "full power and authority to pass all by-laws and ordinances respecting . . . and every other by-law, regulation and ordinance that may seem to them proper for the security, for the peace, health, order and good government of said city." Ga. L. 1874, pp. 116, 119, § 15.

It was in accordance with this authority, granted the City in its charter and reaffirmed by the Revenue Tax Act, that the City of Atlanta enacted the 1964 ordinance,

entitled "An ordinance to regulate the licensing and control of retail dealers in spirituous liquors; collection of revenues therefrom; and for other purposes."

This ordinance is not invalid for any reason assigned. Each provision is germane to and in furtherance of the regulation of the liquor business and the determination of the location of retail liquor stores within the City. As to the sections specifically attacked, section 1 states as the purposes of the ordinance the regulation and control of the licensing and sale of spirituous liquors so as to promote the health and general welfare of the community; sections 2, 3, 4 and 37 restrict licensing to the package store areas established thereby or subsequently changed and provide the procedure for such change; section 53 permits the continuance of existing stores outside the package store areas as a non-conforming use; section 54 restricts the granting of licenses in the package store areas to those locations zoned as commercial or industrial under the zoning laws of the City; and section 59 prohibits successive license applications except those emanating from package store areas.

The allegations of this count do not show that the plaintiff was denied due process.

Since this count did not state a cause of action for any of the relief sought, the general demurrer addressed to it was properly sustained.

2. Count two is based upon the plaintiff's contention that the use of its premises for retail liquor sales should be permitted to continue as a non-conforming use under the ordinance.

It bases this claim upon section 53, which provides that "Where [a] retail liquor store exists on the effective date of this ordinance [March 23, 1964] in an area outside of a package store area, the same may be continued as a non-conforming use of such an area . . ."

However, the plaintiff failed to qualify for this use. It alleged that in September 1963 the State Revenue Commissioner *revoked* its retail liquor license and that

"since that time plaintiff corporation has not been licensed to conduct a retail liquor store . . ." on its premises. Since it had no license, and thus could not make sales to the public, the plaintiff was not an existing retail liquor store on the effective date of the ordinance and therefore does not come within the terms of section 53 as to permissible non-conforming use. Compare *Troutman v. Aiken*, 213 Ga. 55, 56 (96 SE2d 585).

The trial court properly sustained the general demurrer to this count.

Since the dismissal of the petition upon these demurrers was correct, the judgment is

Affirmed. All the Justices concur.

"APPENDIX C"

OFFICE OF CLERK OF BOARD OF ALDERMEN
CITY HALL
ATLANTA 3, GEORGIA

AN ORDINANCE
BY POLICE COMMITTEE

AN ORDINANCE TO REGULATE THE LICENSING AND CONTROL OF RETAIL DEALERS IN SPIRITUOUS LIQUORS; COLLECTION OF REVENUE THEREFROM; AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE MAYOR AND BOARD OF ALDERMEN of the City of Atlanta, as follows:

SECTION 1. This ordinance has been enacted in accordance with a plan designed for the purposes, *among others*, of promoting the health and general welfare of the community, to establish reasonable standards for the regulation and control of the licensing and sales of spirituous liquors, *to protect and preserve schools and churches, to give effect to existing land use and to preserve certain residential areas, with reasonable considerations, among others, to the character of the areas and their peculiar suitability for particular uses, the congestion in the roads and streets, and with a general view of promoting desirable living conditions and sustaining stability of neighborhoods and property values*, and to protect against the evils of concentration of the retail outlets for whiskey in one family or to prevent undesirable persons from controlling the retail liquor industry. (Emphasis supplied.)

SECTION 2. No license to engage in the sale of spirituous liquors shall be issued to any person, firm or corporation for the operation of such business except within the areas described in this ordinance as "package store areas."

SECTION 3. "Package store areas" of the City of Atlanta are those areas prescribed in Exhibit "A" attached hereto and made a part of this ordinance.

SECTION 4. Any person desiring to make application for a change or alteration in the "package store area" established by this ordinance or to create additional "package store areas" shall file such application during the month of January of each year and the Police Committee shall set a date for the public hearing on the matter on or before March 1st thereafter and report its findings to the Board of Alderman. Such application should set out the reasons for the requested changes and the burden of proof shall be on the applicant to establish that the public necessity, convenience or general welfare justifies such action.

SECTION 5. Not more than two licenses to engage in the sale of spirituous liquors at retail shall be issued to any person which shall include all members of such person's family.

SECTION 6. Family shall be deemed to include any person related to the holder of such license within the first degree of consanguinity or affinity as computed according to the Civil Law.

SECTION 7. After the effective date of this ordinance, no person or member of his family shall own, hold or control any interest whatsoever in more than two licenses to engage in the business of selling spirituous liquors at retail.

SECTION 8. It shall be unlawful for any elected or full time appointed official of the City of Atlanta, or his or her spouse or minor children, to have any whole, partial or beneficial interest in any license to operate retail whiskey stores in the City of Atlanta.

SECTION 9. As used in this ordinance an interest in a license shall be deemed to exist if the person involved is the outright owner of the license, a co-owner of the license, a partner in a partnership which owns all or any part of a license, a stockholder in any corporation organized for pecuniary gain which owns all or any part of a license, an owner, lessor, sub-lessor or stockholder in any corporation organized for pecuniary gain owning or leas-

ing any real estate which is occupied by a retail whiskey store or shares in any of the income or corpus of any trust fund or estate having any interest in a retail whiskey store. Notwithstanding any of the other provisions of this section, no one person shall be deemed to have more than one interest in any one license.

SECTION 10. All applicants for licenses must attach to their applications evidence of their good character. No original license shall be issued to any person, partnership or corporation organized for pecuniary gain where any individual having an interest either as owner, partner, stockholder, directly or indirectly beneficial or absolute, or his spouse, shall have been convicted or shall have taken a plea of nolo contendere within ten years immediately prior to the filing of said application for any felony or misdemeanor of any State or of the United States or any municipal ordinance except traffic violations.

SECTION 11. All applications shall include a certificate from a registered surveyor showing a scale drawing of the location of the proposed premises and the straight line distance to the property line of the nearest church or school.

SECTION 12. Spirituous liquors shall be deemed to include, but not limited to, whiskey, rum, gin, brandy, vodka, tequila and all alcoholic beverages of a similar nature and a similar alcoholic content.

SECTION 13. All applications for license, both original and renewal, must be accompanied by a full and complete statement under oath of information relative to any and all interest (as hereinbefore defined in Section 9) in retail packaged whiskey stores. This shall include the names and addresses of all persons interested in the ownership of the business of selling at retail packaged whiskey, together with any interest each person or any member of his immediate family has in any other retail packaged whiskey store; the ownership of the land and building where such retail business is operated; the amount of rental paid for said land and building and the manner

in which the same is determined and to whom and at what intervals it is paid; the names and addresses (by affidavit from the owner, lessor or sub-lessor of such land and building) of all persons having any whole, partial, beneficial or other interest in and to the land and building on and in which said retail packaged whiskey store is located; and any other information called for by the Police Committee of the Board of Aldermen. Any change in any relationship herein declared must be filed when made with the Police Department and failure to so file within a period of thirty days after such change is made shall be ground for cancellation by the Board of Aldermen.

SECTION 14. All applications for licenses for the retail sale of spirituous liquors shall be acted upon by the Police Committee, after a public hearing after advertisement as required by law, and their recommendation shall be reported to the Board of Aldermen for action by that body, provided that no license shall be issued until it has been approved by the Mayor and Board of Aldermen.

SECTION 15. Any person who acquires a license or a renewal of same in violation of this ordinance by any misrepresentation or fraudulent statement shall be deemed guilty of an offense and upon conviction thereof shall be punished in accordance with Section 1.11 of Part II of the Code of the City of Atlanta of 1953.

SECTION 16. The annual license fee for the privilege of engaging in the business of selling spirituous liquors at retail as described herein shall be as follows:

(a) $1,000.00 per annum plus an amount equal to 1 percent of the gross sales of the previous year in excess of $100,000.00.

(b) This section applies to all new licenses or transfers of locations effective at the adoption of this ordinance; this section applies to all renewals of licenses effective January 1, 1965.

SECTION 17. In determining the license fee to be paid by any dealer in spirituous liquors, each individual store or retail outlet shall be considered singly and the license fee fixed shall be determined by sales made at each individual store.

SECTION 18. Annual sales for the purpose of determining the license fee to be paid shall be the sales made by such store or outlet the previous 12 months except that all new stores or licensees shall, for the first year, pay the sum of $1,000.00 per annum.

SECTION 19. No license shall issue for less than a calendar year period and in case of the revocation or surrender of such license before the expiration of such calendar year period, the holder thereof shall not be entitled to receive any refund whatsoever.

SECTION 20. All applications for new licenses for sale of packaged whiskey at retail and all applications for renewal of such new licenses shall be investigated by the Police Department and no such new or renewal license shall be considered by the Police Committee, acted upon by the Board of Aldermen or issued by the City Clerk until the City Attorney has indicated in writing that in his opinion, upon the facts as stated and ascertained by the Police Department, no violation exists as to any ordinance in effect as of the date of the rendering of such opinion. All applicants for new or renewal licenses shall furnish to the Police Department all data, information and records requested of them by the Police Department and failure to furnish such data, information and records within thirty (30) days from the date of the request by the Police Department shall automatically serve to dismiss with prejudice the application of any such applicant failing to furnish such data, information and records.

Applicants by filing for license to sell packaged whiskey at retail agree to furnish the data, information and records as called for herein and also agree to submit under oath to interrogation by the Police Department, the Police Committee of the City Attorney of the City of Atlanta

as to any facts considered pertinent to such application. Applicants by filing such application also agree to produce for oral interrogation by the Police Department, the Police Committee or the City Attorney any person or persons requested by the Police Department of the City of Atlanta and considered as being important in the ascertainment of the facts relative to the said license. Failure to produce such persons within thirty (30) days after being requested so to do shall result in the automatic dismissal of any application for license.

SECTION 21. No license shall be issued to any location which is within 150 feet of any private residence on the same street, said distance to be measured from the front entrance of the proposed retail spirituous store to the nearest point of the residential building. This section of this ordinance shall not apply to licenses issued to hotels, or to private clubs, or to any location within the area of the City bounded on the North by Baker Street, on the East by Piedmont Avenue, on the South by Trinity Avenue and on the West by Spring Street. A "Private residence" for the purpose of this section, is defined as a house or dwelling wherein not less than one nor more than two families reside and shall not include a mobile home court, an apartment house having facilities for housing more than two families, nor a boarding or rooming house where there are five or more boarders or roomers.

SECTION 22. No license shall be granted to a retailer, under the provisions of this chapter, unless the front entrance to the premises is clearly visible from a public street; provided, however, that this restriction shall not apply where the licensee is a hotel, motel, private club, location in a shopping center or multiple story business building.

SECTION 23. No screen, blind, curtain, partition, article or thing which shall prevent a clear view into the interior shall be permitted in the window or upon the doors of any retail liquor store, and no booth, screen, partition or other obstruction shall be permitted within

the interior of any such store. Each such retail store shall be so lighted that the interior of the store is visible day and night.

No retail liquor license shall be allowed in, or in connection with, any restaurant, cafe or eating place, or in the same room where a bar or soda fountain is maintained for the dispensing and sale of beer, wine or soft drinks.

SECTION 24. Each person licensed to sell liquor at retail shall have printed on the front window of the licensed premises the name of the licensee, together with the inscription, " City Retail License No.....," in uniform letters not less than four inches in height, provided however, that if a licensee so desires, he may have his name displayed on the inside of the window in neon or other electric lights. Such sign shall be parallel with the window and so constructed as not to extend more than six inches from the window. A neon sign may also be constructed along the border line or edge of the front window inside the glass.

SECTION 25. Each retail licensee shall have conspicuously displayed within the interior of the licensed premises not less than four copies of a printed price list of the liquors offered for sale and one printed copy of the penal sections of this chapter; provided, however, that a licensee, in lieu of having four copies of a printed price list, may have the price placed on the bottles or on the bottom of the shelf where liquors are exhibited for sale.

SECTION 26. No sign of any kind, painted or electric, advertising any brand or price of liquor shall be permitted on the exterior, or in the window, of any licensed premises. No placard or sign of any kind which is visible from the exterior of the licensed premises shall make reference to the price of any liquors sold therein; provided, however, that tags showing the prices of individual bottles or containers may be affixed to each such bottle or container or to the edge of the shelf whereon such bottles or containers are located.

SECTION 27. No retail dealer shall permit on his premises any slot machines or mechanical music boxes or pinball machines of any kind or character or any coin operated machines or any machines operated for amusement purposes.

SECTION 28. Retail dealers in spirituous liquors shall not engage in the sale of such liquors except between the hours of 8:00 A.M. and 11:45 P.M. on weekdays and shall not permit their places of business to be opened for the sale of liquors on Sundays, election days, Christmas day, Thanksgiving day, Labor day, July 4th and New Year's day. The business hours of wholesale dealers shall be from sunup to sundown. "Election days" shall be deemed to refer to elections held within the corporate limits of the city.

SECTION 29. No retail licensee shall employ any female or minor in his store, or in the department of a store where alcoholic beverages are sold.

SECTION 30. No retail licensee shall sell any alcoholic beverages to any person under the age of twenty-one years or to any person in an intoxicated condition, or to any person known to such licensee or his employee to be a habitual drunkard, or to any person known to such licensee or his employee to be of intemperate habits or of unsound mind.

SECTION 31. It shall be unlawful to make deliveries of alcoholic beverages except in the store or department of the store in which such beverages are sold.

SECTION 32. It shall be the duty of all persons holding retail or wholesale licenses to sell alcoholic beverages to file with the Chief of Police the names of all employees, with their home addresses and home telephone numbers and places of employment. Changes in the list of employees, with the names of new employees, must be filed with the Chief of Police within three days from the date of any such change.

SECTION 33. Whenever the state shall revoke any permit or license to sell at retail any spirituous liquors, the city license to deal in such products shall hereupon be automatically revoked without any action by the Mayor and Board of Aldermen or any municipal officer.

SECTION 34. When a license has been approved and the applicant has deposited with the Clerk of the Board of Aldermen the required fee, the fee shall be paid to the municipal revenue collector and a license issued.

SECTION 35. In the event the applicant is denied a license by the State, upon the proof of such refusal, he shall be entitled to a refund of the license fee, less a charge of ten dollars to cover clerical cost of granting the license. Such refund may be made by the comptroller without the necessity of any action by the Mayor and Board of Aldermen.

SECTION 36. All licenses must be obtained and fees paid not later than two weeks from the date of the approval of the application by the Mayor and Board of Aldermen, and if not so obtained, the permit granted by the Mayor and Board of Aldermen shall be void.

SECTION 37. All persons desiring to engage in the sale of spirituous liquors at retail in the city or desiring any change or alteration in the package store areas shall give notice of the purpose of making such application by advertisement at least five times on different days in the daily paper published in the city in which the legal advertisements of the city are carried, which notice shall contain a particular description of the location of the proposed liquor business and shall give the name of the applicant, and if a partnership, the names of the partners, and if a corporation, the names of the officers. The advertisement referred to herein shall be of type not smaller than ten-point capital and lower case and shall be at least a one inch two column advertisement.

SECTION 38. No retail license hereunder would be granted to any applicant who is not a citizen of the United States, or who has not resided continuously in Georgia for

the three years next preceding the year for which application is made, or who has not resided continuously within Fulton County for the one year period next preceding the year for which application is made. Where the applicant is a corporation, the license shall be issued to the corporation and an officer or agent of such corporation who meets the above requirements. If the applicant is a partnership the within requirements shall apply to all the partners.

SECTION 39. Where a building in which a retailer intends to operate under the provisions of this chapter is at the time of the application for such license not in existence or not yet completed, license may be issued for such location provided the plans for the proposed building show clearly a compliance with the other provisions of this chapter. No sales shall be made from such establishment until it has been completed in accordance with the said plans and is in conformity with all of the other provisions of this chapter.

SECTION 40. Licenses to engage in the business of selling spirituous liquors at retail shall not be transferable, except as otherwise provided herein. In case of the death of any person holding such a license, or any interest therein, the same may, in the discretion of the Mayor and Board of Aldermen, be transferred to the administrator, executor or the lawful heirs of the deceased person.

Nothing in this section, however, shall prohibit one or more of the partners in a partnership holding a license to withdraw from the partnership in favor of one or more of the partners who were partners at the time of the issuance of the license. Such a withdrawal shall not, however, serve to bring any new ownership into the partnership.

Should a transfer of a location be approved, there shall be no pro-rata return of any license fee and the new location shall be considered as a new license hereunder.

No transfer of a license from one package store area to another area will be permitted if the person making the

application for the transfer holds a license or has any interest in any license in the area where the transferred location would be situated.

SECTION 41. However, a licensee may take in partners or additional stockholders where it is determined that the additional capital furnished is to be used exclusively for additional inventory or expanding the facilities of the business or for building new facilities and where it appears that the licensee himself receives directly none of the additional capital invested. Under this section an additional partner or stockholder must be approved by the Police Committee, and, if approved, the business must obtain a new license.

SECTION 42. All holders of licenses for the retail sale of spirituous liquors must within nine months after the issuance of said license open for business the establishment referred to in the license and begin the sale of the product or products authorized by the said license. Failure to open the establishment and begin the sale as referred to above within the nine months period shall serve as automatic forfeiture and cancellation of the unused license and no refund of license fees shall be made to the license holder.

SECTION 43. Any holder of a license for the retail sale of spirituous liquors who shall begin the operation of the business and sale of the product or products as authorized in the said license, but who shall for a period of nine consecutive months thereafter cease to operate the business and sale of the product or products authorized in the said license, shall upon completion of the said nine months' period automatically forfeit his license, which license shall, by virtue of said failure to operate, be cancelled without the necessity of any further action of the Police Committee or the Board of Aldermen.

SECTION 44. No license shall be issued to any retailer hereunder where the place of business of the license is located within fifty yards of a branch of the Atlanta Public Library, which is on the same side of the street as the

proposed store, or unless the business premises of the proposed location is situated beyond one hundred yards from any property line of any church and beyond two hundred yards from any property line of any school ground or college campus, except that the restriction of this section shall not apply to hotels of fifty rooms or more which have been in continuous operation for a period of at least five years immediately prior to April 5, 1938, or to private social clubs owning their own homes, which have been chartered and in continuous operation for a period of twenty-five years prior to such date. The schools or colleges referred to herein shall include only such state, county, city, church or other schools as teach the subjects commonly taught in the common schools and colleges of this state and shall not include private schools or colleges wherein only specialized subjects, such as law, stenography, business, music, art, medicine, dentistry, vocational occupations and other special subjects are taught.

SECTION 45. The distance set out in the preceding section shall be measured in a straight line. It is further provided, that any person heretofore licensed to operate any of the businesses described in this chapter where a different method of ascertaining minimum distances set out in the preceding section was used may continue to operate such business at the present location without committing a violation of this section.

SECTION 46. Any untrue or misleading information contained in or material omission left out of an original, renewal or transfer application for a retail liquor license shall be cause for the denial thereof, and, if any license has been granted under these circumstances, there shall be cause for the revocation of same.

SECTION 47. No license which has been issued or which may hereafter be issued by the City to any person as a retail dealer in spirituous liquors shall be suspended or revoked, except for due cause as hereinafter defined, and after a hearing and upon the prior three day written notice to the holder of such license of the time, place and purpose of such hearing and a statement of the charge

upon which such hearing shall be held. "Due cause" for the suspension or revocation of such license shall consist of the violation of any laws or ordinances regulating such businesses, or violation of regulations made pursuant to authority granted for the purpose of regulating such businesses, or for the violation of any State or Federal Law, or for the violation of any City ordinances other than the traffic ordinances.

SECTION 48. The Police Committee of the Board of Aldermen is delegated the authority to conduct the hearings herein and report their findings and recommendations to the Board of Aldermen. The Police Committee is delegated authority to suspend any license hereunder; said suspension may be made effective immediately and remain in force until the next regular meeting of the Board of Aldermen. Nothing herein limits the Police Committee's power to suspend for a time expiring prior to the next regular meeting of the Board of Aldermen, nor in any way limits or repeals any ordinance under which the Police Committee acts as a regulatory body but is restricted to the licenses herein described.

SECTION 49. This amendment is adopted under authority of Charter Power of the City as codified in Part I of the 1953 City Code as Section 14.21 and 14.24, and the licenses herein shall remain a mere grant or privilege in that, in the event of revocation by the Board of Aldermen, the license shall not be entitled to a return of the unearned license fee.

SECTION 50. All such licenses hereunder shall have printed on the front these words:

> "This License is a mere privilege, subject to be revoked and annulled by the Mayor and Board of Aldermen of the City of Atlanta and is subject to any future ordinances eliminating notice and hearing prior to revocation, with or without cause."

SECTION 51. No person shall hold a retail license who also has any direct financial interest in any wholesale liquor business.

SECTION 52. All schools, churches and libraries situated within a package store area shall be excluded from such area provided that the property on which such schools, churches and libraries are located shall become a part of such package store area should they cease to be used for such purposes.

SECTION 53. Where retail liquor store exists on the effective date of this ordinance in an area outside of a package store area, the same may be continued as a non-conforming use of such an area; provided, however, that no such non-conforming use shall in any way be expanded or extended either on the same or adjoining property. If such non-conforming use of such an area or any portion thereof is discontinued or changed, it will revert back to its zoning class and shall not be a package liquor area.

SECTION 54. No license to engage in the sale of spirituous liquors shall be issued within the areas described in this ordinance unless the location has been zoned commercial or industrial under the Zoning Laws of the City of Atlanta.

SECTION 55. All applications for new licenses or for transfers of existing locations shall be passed upon by the Board of Aldermen within sixty (60) days from the date of the filing of such application.

SECTION 56. All applications now pending for the year 1964 for the issuance of retail liquor licenses and transfers thereof shall be considered under this ordinance without further filing.

SECTION 57. All applications to engage in the sale at retail of spirituous liquors meeting the standards of this ordinance shall be granted, and the limitation on the number of stores is hereby removed.

SECTION 58. All applications for transfer of existing locations shall comply with the provisions herein set forth governing new licenses.

SECTION 59. When any application for a permit to transact any business within the control of the police powers is denied for cause or revoked for cause by the

Police Committee or the Mayor and Board of Aldermen, it shall be unlawful for the Police Department to accept or consider any application for license to operate in such location the same type of business within twelve (12) months from the time of the rejection by the Police Committee or the Mayor and Board of Aldermen; Provided, however, that this section shall not apply to applications to sell at retail spirituous liquors where such location is in a package store area.

SECTION 60. If any clause, sentence, paragraph, section or any part of this ordinance shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof.

SECTION 61. All laws and parts of laws in conflict with this ordinance as to the sale at retail of spirituous liquors are repealed.

ADOPTED, AS AMENDED, By Board of Aldermen March 23, 1964

APPROVED March 23, 1964

"A True Copy"

"APPENDIX D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,
Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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(January 7, 1964.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, JR., District Judge.

TUTTLE, Chief Judge: Appellant Mrs. Hornsby is an unsuccessful applicant for a license to operate a retail liquor store in Atlanta, Georgia. She brings this action under 28 U.S.C. §1343[1] to redress an alleged deprivation of civil rights and under 28 U.S.C. §2201 to obtain a declaration of her rights. The Mayor, the City Clerk, and the Aldermen of Atlanta are defendants. In her complaint, Mrs. Hornsby alleges that although she met all the requirements and qualifications, as to moral character of the applicant and proposed location of the store, prescribed for the holder of a retail liquor dealer's license, her application was denied "without a reason therefor" by the Mayor and Board of Aldermen. This action is

characterized as "arbitrary, unreasonable, unjust, capricious, discriminatory" and in contravention of the due process and equal protection clauses of the 14th Amendment. The complaint also charges that a system of ward courtesy was followed in the issuance of liquor licenses; under this system licenses allegedly would be granted only upon the approval of one or both of the aldermen of the ward in which the store was to be located. This too is said to constitute a violation of the 14th Amendment.

The defendants' motion to dismiss was granted by the court below on the ground that the complaint only concerned a political question which was not covered by the due process provisions of the 14th Amendment, since dealing solely with motives of a legislative body in voting upon legislation, and which did not draw into question the equal protection clause, since there was no allegation of discrimation. The court indicated that the issuance of a liquor license was within the discretion of the Mayor and the Board of Aldermen and concluded that a federal court had no jurisdiction to entertain an attack on that process.

At the outset, we note our disagreement with the district court's classification of the challenged actions as purely those of a legislative body; we do not conceive the denial of an application for a license to be an act of legislation. Although there is disagreement on the matter, see 73 C.J.S., Public Administrative Bodies and Procedures, § 71, at 398, we prefer the view that licensing proper is an adjudicative process. Thus when a municipal or other governmental body grants a license it is an adjudication

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1 § 1343 "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

that the applicant has satisfactorily complied with the prescribed standards for the award of that license. Similarly, the denial of a license is based on an adjudication that the applicant has not satisfied those qualifications and requirements. On the other hand, the prescription of standards which must be met to obtain a license is legislation, since these standards are authoritative guides for future conduct derived from an assessment of the needs of the community. *(A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.)*

Since licensing consists in the determination of factual issues and the application of legal criteria to them—a judicial act—the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see *Tadano v. Manney*, 169 F.2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941). Although strict adherence to the common-law rules of evidence at the hearing is not required, see *Crowell v. Benson*, 285 U.S. 22, 48 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, *Morgan v. United States*, 304 U.S. 1 (1938), to present evidence to support their contentions, see *id.* at 18, and to cross-examine witnesses for the other side, *Reilly v. Pinkus*, 338 U.S. 269 (1949). Thus it is not proper to admit *ex parte* evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party. *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951); see *Chin Quong Mew v. Tillinghast*, 30 F.2d 684 (1st Cir. 1929). *A fortiori*, the deciding authority may not base its decision on evidence which has not been specifically brought before it, *United States v. Abilene & So. Ry.*, 265 U.S. 274 (1924); the findings must conform to the evi-

dence adduced at the hearing, *Tadano v. Manney*, 160 F.2d 665 (9th Cir. 1947). Furthermore, the Supreme Court has said that an administrative order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order, . . . There must be a responsible finding." *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Thus where the Secretary of State indicated that passport regulations precluded the issuance of a passport to the applicant in question, but did not specify the applicable subsection or set out the findings on which the conclusion was based, it was held that factual findings would be required before the Secretary could deny the application. *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956).

(Also, the Supreme Court has held that the arbitrary refusal to grant a license or permit to one group when other groups have obtained permits under similar circumstances constitutes a denial of equal protection of the law.) *Niemotko v. Maryland*, 340 U.S. 268 (1951) (alternative holding). Although this case raised the problem of freedom of religion, state action and hence, necessarily, the 14th Amendment were involved. The Court concluded that a "completely arbitrary and discriminatory refusal to grant" park permits sought by Jehovah's Witnesses constituted a denial of equal protection of the law where other religious organizations had customarily been allowed to use the park.

(The appellees here, however, seek to place liquor in a special category, and argue that since Georgia has declared a license to sell spirituous liquor to be a privilege, the licensing authority has an unreviewable discretion to grant or deny licenses. It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, see *Midwest Beverage Co. v. Gates*, 61 F.Supp. 688, 690 (N.D. Ind. 1945), but this is something quite different from, right to act abritririly and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process require-

ments in licensing and allow them to exercise an uncontrolled discretion.) There is no suggestion here that Georgia has sought to declare the sale of retail liquor to be a public business which can be franchised by the state and treated as devoted to a public use, as the State of Oklahoma did with cotton ginning, see *Frost v. Corporation Commission*, 278 U.S. 515 (1929), and the State of Utah did with mining, see *Strickley v. Highland Bay Mining Co.*, 200 U.S. 527 (1906). (To the contrary, the State of Georgia has limited municipalities in the exercise of their authority over liquor businesses to those *reasonable* rules and regulations which fall within their police powers.)

Next, we note that states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, see *State Bd. of Equilization v. Young's Mkt. Co.*, 299 U.S. 59 (1936), the Amendment does not confer any other powers, see *Sancho v. Corona Brewing Corp.*, 89 F.2d 479 (1st Cir. 1937). "[T]he Twenty-First Amendment did not clothe the State's right to control the sale of liquor with any higher degree than it had over the sale of other commodities within the State." *Brown v. Jatros*, 55 F.Supp. 542, 544 (E.D. Mich. 1944).

Neither is the assertion that liquor may be a menace to public health and welfare a sufficient answer to Mrs. Hornsby's allegations. The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards. Indeed, the great social interest in the liquor industry makes an exceptionally strong case for adherence to proper proce-

dures and access to judicial review in licensing the retail sale of liquor. The possibility of high profits on the one hand and the danger of strict governmental limitations on the other hand create a fertile breeding ground for the temptations of graft, corruption, and other abuses of governmental office. (If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.) See *Francis v.* Fitzpatrick, 129 Conn. 619, 30 A.2d 552; *Glicker v. Michigan Liquor Control Commission,* 6 Cir., 160 F.2d 96.

The closest case on point we have discovered is *Glicker v. Michigan Liquor Control Commission, supra.* There an action was brought under the Civil Rights Act for an order requiring the state liquor commission to renew a license which had allegedly been revoked as an intentional and deliberate discrimination motivated by political considerations. The trial court dismissed the complaint for failure to state a cause of action, but the Court of Appeals for the Sixth Circuit reversed, holding that a valid claim was stated under the equal protection clause and the substantive provisions of the Civil Rights Act, 42 U.S.C.A. § 1983. (We see no valid distinction between the revocation of a license, as in *Glicker,* and the denial of an application, as in the case at hand. An applicant for a license has the right to be treated in the same manner as prior, successful applicants are.) See *Niemotko v. Maryland, supra.* Compare *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945).

(We find in this case that Mrs. Hornsby's allegations, if borne out by the evidence, are sufficient to show a violation of her 14th Amendment rights. If her application actually was denied because the delegation from her ward

decided, from their own knowledge of the circumstances, that Mrs. Hornsby should not be issued a liquor license, then she was deprived of the hearing which due process requires, since she could not discover the claims of those opposing her and subject their evidence to cross-examination. In addition, Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license. Next, the alleged failure of the board to reveal the basis for denying her application would, if true, be a denial of her right to have the board make findings based on the evidence adduced at a hearing. Moreover, appellees themselves indicate that the mandates of equal protection were not observed in the awarding of liquor licenses: "[I]n granting a mere privilege, appellant cites no authority which would prevent the defendants [appellees] from arbitrarily accepting one eligible application while denying others; otherwise they would, of necessity, be forced to grant licenses to every eligible citizen upon application." Brief for Appellees, p. 7. If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified.)

Merely showing a violation of a constitutional right is, however, not sufficient to gain access to the federal courts; since Mrs. Hornsby has not sought to invoke jurisdiction under the federal question provision, 28 U.S.C.A. § 1331, we must determine whether she has alleged an actionable claim under the Civil Rights Act, Revised Stats. § 1979, 42 U.S.C.A. § 1983, within the jurisdiction of the district court, 28 U.S.C.A. § 1343(3). The coverage of the Civil Rights Act has long been the subject of heated controversy. Courts have been reluctant to allow what they consider simple state actions for false imprisonment and assault and battery to be brought in the federal courts as civil rights actions. See *Monroe v. Pape*, 365 U.S. 167, 240 n. 68 (1961) (opinion of Frank-

furter, J.) Also, they have been very strict in requiring that a complaint set forth *facts* showing a denial of the protected rights and not merely "factually unsupported characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plantiffs of their constitutional rights." See *McGuire v. Todd*, 198 F.2d 60 (5th Cir.) *cert. denied*, 344 U.S. 835 (1952). Furthermore, at one time various limitations were propounded on the specific rights protected by the statutes—see *Agnew v. City of Compton*, 239 F.2d 226, 231 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957) (due process apparently not protected absent allegations of discrimination between persons); *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955) (no action allowed for denial of equal protection—on the degree of state action required—see *Screws v. United States*, 325 U.S. 91, 142 (1945) (dissenting opinion) (civil rights statutes inapplicable where act a violation of state law)—and on the types of discrimination covered—see *Snowden v. Hughes*, 321 U.S. 1 (1944) (intentional or purposeful discrimination required in equal protection case); *Deloach v. Rogers*, 268 F.2d 928 (5th Cir. 1959) (only discrimination based on class or race actionable).

The trend of the recent cases, however, has been to accept more and more actions under the civil rights statutes. Thus suits have been allowed for damages for intimidating a prisoner and interfering with his right to counsel, *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); for damages resulting from an illegal search and seizure and police brutality, *Geach v. Moynahan*, 207 F.2d 714 (7th Cir. 1953), *Davis v. Turner*, 197 F.2d 847 (5th Cir. 1952); for an injunction against enforcement of ordinances regulating the operation of taxicabs, *Walton v. City of Atlanta*, 181 F.2d 693 (5th Cir.), *cert. denied*, 340 U.S. 823 (1950) (judgment for defendants on merits); and for damages to one barred from Las Vegas casinos as an undesirable character, *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962). The Supreme Court, in *Monroe v. Pape*, 365 U.S. 167 (1961), gave the

ultimate seal of approval to a construction of section 1983 not requiring an allegation of a purpose to discriminate. See *Cohen v. Norris*, 300 F.2d 24, 29-30 (9th Cir. 1962) (overruling *Agnew v. City of Compton*, *supra*, and other cases). *Monroe v. Pape* upheld a complaint alleging damages from an illegal search and seizure under color of state and municipal statutes, customs and usages but not with any specific intent. *Accord*, *Egan v. City of Aurora*, 365 U.S. 514 (1961). It is, therefore, now recognized that no specific intent to deprive a plaintiff of his civil rights need be alleged, see *Stringer v. Dilger*, 313 F.2d 536, 540 (10th Cir. 1963), and that an intentional and purposeful discrimination is necessary only under the act's criminal sections, see *Monroe v. Pape*, *supra* at 187, or under the conspiracy provisions, see *Lewis v. Brautigam*, *supra* at 127-28.

Moreover, the case of *Baker v. Carr*, 369 U.S. 186 (1962), may have relaxed the requirements announced in *Snowden v. Hughes*, *supra*, for equal protection cases. Jurisdiction in *Baker v. Carr*, rested in part on section 1343(3), and the Court expressly upheld jurisdiction. But the gist of the complaint was merely a denial of equal protection through gradual shifts in population, although it was alleged that the original 1901 apportionment was arbitrary and capricious. Hence it is at least doubtful that an allegation of an intentional and purposeful discrimination is necessary to sustain civil rights jurisdiction, even where founded on a denial of equal protection.

Judging Mrs. Hornsby's complaint in the light of the requirements that it set forth (1) that plaintiff has been denied a protected right, privilege or immunity, and (2) that defendants acted under color of a state or local law, see *Stringer v. Dilger*, *supra* at 540, *Marshall v. Sawyer*, *supra* at 646, we find she has set forth an actionable claim within the jurisdiction of the district court. (We have already concluded that Mrs. Hornsby alleged denial of her 14th Amendment rights. That this was done under the color of state law is too plain to merit extended discussion. Mrs. Hornsby was denied a liquor license by the

Board of Aldermen, acting under the authority of the Ga. Code Ann. §§ 58-1031-103, to pass on the fitness of applicants and issue licenses. Moreover, the Board of Aldermen, functioning as an agency of the state under Ga. Code Ann. § 58-1028, had the right to adopt rules and regulations for liquor businesses, and to determine the location of retail stores.)

The proper question to be determined upon the hearing of this case in the district court is not whether the plaintiff below is entitled under the law to a liquor license. The determination of whether she should be granted one is a function of the Aldermanic Board. The role of the courts is to ascertain whether the manner in which this determination was or is made accords with constitutional standards of due process and equal protection. We are of the opinion that the complaint alleged sufficient facts to show that the denial of appellant's application for a license did not meet these standards and, since done under color of state statute, constituted a violation of 42 U.S.C.A. § 1983.

It follows that the trial court must entertain the suit and determine the truth of the allegations. (If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field.)

The judgment is REVERSED.

JONES, Circuit Judge, dissenting:

With some of the Court's opinion I am in disagreement. Some of the Court's opinion I do not understand.

The Court's opinion, as I read it, decides that the refusal to give Mrs. Hornsby a liquor license is not legislative, but adjudicative and therefore judicial. These statements are not essential to the decision and may be misleading in the consideration of some future case.

I see no necessity of extending federal civil rights jurisdiction to the review of state administrative decisions where it is asserted that irreparable injury has resulted from arbitrary action of a state administrative agency in violation of due process and declaratory and injunctive relief is sought. In such cases federal jurisdiction seems to be established without any civil rights controversy. 3 Davis, Administrative Law Treatise 310 et seq. § 23.05.

The Court directs the district court, upon finding that the allegations of the complaint are true, to "enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided." This is not a class action, and if the Court is going to prescribe the remedy that the district court shall grant, might it not be just as well to confine the relief to the appellant who seems to be the only person now complaining?

It is not clear to me why the Court does not direct the district court, if it must give directions, to enjoin the issuance or renewal of licenses until standards are established and procedures provided. This sort of a directive would, so I think, be better than the one which the Court has adopted. (The order directed by the Court will, I fear, open the door to a flood of applications for licenses, none of which the appellees, under this decision, will be permitted to deny.)

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"APPENDIX E"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,

Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(April 3, 1964.)

ON MOTION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM: Appellees have filed a petition for rehearing in which they challenge our original holding and seek clarification of the principles involved.

As to the first contention the cases cited by appellees to support the broad discretionary powers of liquor licensing authorities all stand for the proposition that local governmental bodies have great latitude in enacting reasonable standards and qualifications for those in the liquor business or seeking to engage in it. They do not say that the licensing authority can select those who are to receive licenses on the basis of uncontrolled discretion and whim, nor do they say that licensees can be selected

without any established standards or in disregard of established standards. Thus, the cited case of *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, involved the conviction of one who had sold liquor without a license. The appellant challenged the state statute which required a license to sell imported liquors in quantities less than 28 gallons. The statute was upheld and the conviction affirmed. It can be readily seen that the discretion upheld there was in the general limitation on the right to sell liquor; Thurlow was subjected to the same restrictions as all others in the state.

Furthermore, we cannot agree with appellees' contention that a liquor applicant is like a candidate for a state governmental office who has no rights secured by the United States Constitution. The liquor business is like any other business in that the state is limited in its regulation of it by due process and equal protection requirements although the peculiar nature of the business warrants the imposition of severe limitations on liquor traffic and tight restrictions on those persons engaged in it. In answer to appellees' suggestion that some rights, such as the right to practice law in a state court, are privileges not protected by the Constitution, we call attention to *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

To deal with the requests for clarification next, we reiterate that the function of the trial court will not be to determine whether Mrs. Hornsby is entitled under the law to a liquor license; rather it is to ascertain if the manner in which it is determined whether she should be granted one accords with constitutional standards. This Court will not suggest how the determination should be made other than to point out that every applicant should be apprised of the qualifications necessary to obtain a license and should be afforded a reasonable opportunity to show that he does or does not meet them. If appellees fear that too many applicants are qualified under existing standards, then, we repeat, they may raise the standards of eligibility and fix limits on the number of licenses to be issued. If there are more applicants than

licenses and all applicants are equally qualified to se
the general welfare, perhaps an unlikely event, then
lection among them by lot or on the basis of the chro
logical order of application would meet constitutional
quirements.

The motion for rehearing is DENIED.

JONES, Circuit Judge, I dissent.

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IN THE

Supreme Court of the United States

PLAZA LIQUOR STORE, INC.

Petitioner

vs.

CITY OF ATLANTA

Respondent

NO. 1038

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Trial Judge of the Atlanta Judicial Circuit is reprinted as "Appendix A" hereof. The decision of the Supreme Court of Georgia, not yet printed in the official reports, is reprinted as "Appendix B" hereof.

JURISDICTION

The judicial requisites are adequately set forth in the petition.

QUESTION PRESENTED

1.

It is contended by the Respondent that the question

presented is an inaccurate question for the following reasons:

(a) The municipality has acted under no guise;

(b) Public hearings were held prior to the passage and adoption of said ordinance March 23, 1964;

(c) The municipality is authorized by Georgia Laws, 1937-1938, Extra Session, page 103 to adopt reasonable rules and regulations as may fall within the police powers of such municipality to regulate the issuing of licenses and determining the location of distilleries, wholesale businesses, or retail businesses licensed by them.

(d) The City of Atlanta has full power and authority to pass all such ordinances respecting the licensing of retail liquor stores. (Ga. L. 1874, p. 116 §15);

(e) The petitioner was not using the real estate as a retail liquor package store in view of the fact that plaintiff, in its first amendment to its original petition (paragraph 3), alleged that its retail liquor license had been revoked on September 1, 1963 and it had no license when the ordinance, "Appendix C" of the petition, was passed on March 23, 1964. In support of this statement, we cite Paragraph 3 of plaintiff's petition which reads as follows:

"3.

"On or about the 1st day of September, 1963, the Commissioner, State Revenue Department, State of Georgia, revoked the retail liquor license of PLAZA LIQUOR STORE, INC., and since that time plaintiff corporation has not been licensed to conduct a retail liquor store at 3281 Roswell Road, N.E., Atlanta, Fulton County, Georgia."

Therefore, it is contended by the Respondent that the question, as presented, is inaccurate for the above reasons and if any question be presented, it would be as follows:

> "Can a petitioner force a municipality to issue to him a license for a retail liquor store when the petitioner does not come within the provisions of reasonable rules and regulations, applying justly to all the people?"

STATUTES INVOLVED

The petition adequately sets forth the statutes involved. The ordinance in controversy is marked "Appendix C" of the petition.

STATEMENT OF THE CASE

On the 1st day of September, 1963, the Commissioner of the State Revenue Department of the State of Georgia for cause revoked the retail liquor license of the petitioner. Since September 1, 1963, therefore, the petitioner has not been licensed to conduct a retail liquor store at No. 3281 Roswell Road, N.E., Atlanta, Fulton County, Georgia. (Petitioner's first amendment to his original petition, filed in Fulton Superior Court, Atlanta, Georgia, and set forth as paragraph 3.)

Prior to March 23, 1964, a decision was rendered in the United States Court of Appeals for the Fifth Circuit, No. 2065, entitled *Mrs. Lola Hornsby, Appellant, versus Ivan Allen, Mayor of the City of Atlanta, et al, Appellees.*

On April 3, 1964, the United States Court of Appeals for the Fifth Circuit, in Case No. 2065, entitled *Mrs.*

Lola Hornsby, Appellant, versus Ivan Allen, Mayor of the City of Atlanta, et al, Appellees, denied a petition for rehearing filed for the purpose of asking for clarification of the principles involved in the former decision, which clarification is set forth in "Appendix D" of this Brief in Opposition.

Pursuant to the decision laid down in the *Hornsby case, supra,* the people of the City of Atlanta, after public hearings, adopted and approved on March 23, 1964 an ordinance entitled "An ordinance to regulate the licensing and control of retail dealers in spirituous liquors; collection of revenue therefrom; and for other purposes." ("Appendix C" of the petition.)

Said ordinance was adopted and approved specifically to obey, be consonant with and come within and under the decision rendered in the *Hornsby case, supra.*

Thereafter, on the 2nd day of July, 1964, the petitioner filed its action in Fulton Superior Court, Atlanta, Georgia against the City of Atlanta, twice amended, alleging in substance that it had previously operated Plaza Liquor Store, Inc. at No. 3281 Roswell Road, N.E., in Atlanta, Fulton County, Georgia; that the value of its real property and fixtures was falling substantially, and that its liquor store was in existence on March 23, 1964 and had been for more than six years prior to the enactment of this ordinance. (Paragraph 3 of plaintiff's first amendment to its original petition states that it had not been licensed to operate a retail liquor store since September 1, 1963). Petitioner further alleged that the City of Atlanta had interfered with the plaintiff's lawful use and occupancy of its property thereby diminishing its leasehold value; that plaintiff was deprived of due proc-

ess of law, alleging that said ordinance in question was enacted without notice or an opportunity to be heard of any kind and was contrary to the 5th and 14th Amendments to the Constitution of the United States.

The petitioner sought relief asking that Sections 1, 2, 3, 4, 37, 54 and 59 of the ordinance be declared null and void and for other relief.

Respondent filed general demurrer and motion to dismiss petitioner's complaint and the Trial Court after argument of counsel on October 7, 1964, by written order, sustained a motion to dismiss. (Marked Appendix "A" of the petition.) Thereafter, plaintiff, as provided by law, appealed the judgment of the Trial Court to the Supreme Court of Georgia, and on February 4, 1965, in a written opinion wherein all the Justices concurred, the judgment of the Trial Court was affirmed and the litigation terminated in favor of the Respondent.

ARGUMENT AND REASONS FOR DENYING THE WRIT

A. No important question of Federal Law.

This case does not present a question of importance among the several states as the decision of the Supreme Court of Georgia turns upon its own facts and it will affect only the litigant and indeed, very few, if any, others.

This statement is based upon the fact that if there is any other person desiring a retail liquor dealer's license outside the defined package store area, in said ordinance, it has not yet come to light.

B. There is no conflict of decision.

The ordinance, as adopted and approved, was so passed and adopted and actually designed to be in harmony with and compatible to the decision rendered in the case of *Mrs. Lo'a Hornsby vs. Ivan Allen, Mayor of the City of Atlanta, Et Al,* No. 326 Fed. 2d, 605, "Appendix C" of this Brief.

There is no conflict of decisions as contended by the petitioner. Actually, the Respondent presents two questions it thinks controlling in regard to the issues raised on the general demurrer as to Count One of plaintiff's petition. They are as follows:

1. Is it a valid exercise of the police power for a muncipiality to regulate the placement of retail package liquor stores?

2. If the above question be answered in the affirmative, can a municipality so regulate by a liquor ordinance when there is a comprehensive zoning statute?

COUNT ONE of the petition purports to make a constitutional attack upon the ordinance of the City of Atlanta entitled "AN ORDINANCE TO REGULATE THE LICENSING AND CONTROL OF RETAIL DEALERS IN SPIRITUOUS LIQUORS; COLLECTION OF REVENUE THEREFROM; AND FOR OTHER PURPOSES." COUNT ONE also seeks injunctive relief.

Acts 1937 - 38, Ex. Sess., pp. 103, 111 entitled "Alcoholic Liquors — Regulation and Tax" provides as follows:

> "Nothing in this Act shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Act. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them."

We emphasize the language and meaning of this Code Section as it clearly states "Nothing in this Chapter shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Chapter." (This Chapter deals with Intoxicating Liquors.) We emphasize that the Code Section quoted above clearly and specifically states "All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them."

This grant of legislative authority is indeed clear, in addition to other grants of legislative authority to municipalities, as regards intoxicating liquors, the same being an exercise of police power.

It was held in *Owens* v. *Rutherford*, 200 Ga. 143 at 149 (1945): "Inasmuch as a license to sell spirituous liquors is neither a contract nor a property right in the licensee but a mere permit to do what would otherwise be an offense against the general law, it is, when granted

by a municipal corporation, subject at all times to *the police powers of that corporation,* and the latter, in the absence of any charter restriction upon its authority in this respect, may in the exercise of those powers revoke the license at any time."

Ison v. *Mayor & Council of Griffin*, 98 Ga. 623 (1895)

Plumb v. *Christie*, 103 Ga. 686 (1898)

Melton v. *Mayor & Aldermen of Moultrie*, 114 Ga. 462 (1901)

Phillips v. *Head*, 188 Ga. 511 (1939)

Highnote v. *Jones*, 198 Ga. 56 (1944)

The Court further held on page 149 as follows: "Nothing in this act contained shall be construed as giving any person a right to sell spirituous liquors as herein defined, but the manufacture, sale and distribution of spirituous liquors is declared to be a privilege in this State and not a right." Also, "It is perfectly clear, therefore, that the act has in no wise enlarged the status of a licensee beyond that of a mere holder of a permit which is revocable at any time without cause, as declared in the decisions above cited."

The Court further, in its opinions, stated: "Since the petitioners are engaged in a business which is only permissive, and not the exercise of a legal right, and is subject to the will of the authorities granting the permit, and under the police powers of the municipality, in the absence of any charter restriction upon its authority in this respect, the license may be revoked at any time without cause. . . ."

The Court held further and stated: "In a number of cases it has been held that the revocation of a license to sell spirituous liquors, when done under the police power of a municipality, does not deprive the licensee of his property without due process of law."

Sprayberry v. *The City of Atlanta*, 87 Ga. 120 (1890)

Cassidy v. *Mayor & Council of Macon*, 133 Ga. 689 (1909)

McKown v. *City of Atlanta*, 184 Ga. 221 (1937)

The Court also held on page 150: "Being the exercise of police power, the revocation here was not, as contended by the plaintiffs in error, violative of article 1, section 4, paragraph 1 of the Constitution of this State."

Under Acts 1937-38, Ex. Sess., pp. 103, 111 above cited, and under the holdings in the above decisions set forth, it is the contention of the City of Atlanta that there can be no room for doubt but what the ordinance as passed was done under the authority of the police powers granted to the City of Atlanta under Title 14, Article III of the Charter of the City of Atlanta of 1953, as amended.

Zoning regulations are in a different category from districting under the police powers in regards to designating areas for liquor stores. Due to the nature of liquor stores in being inherently inimical to society, different laws are applicable to the control thereof. The law is to the effect that municipalities must have express power to zone and that municipalities can district liquor areas through their general police powers. To the effect that expressed power to zone is necessary for municipalities

to pass zoning ordinances, see *City of Pearson* v. *The Glidden Company* 205, Ga. 738 (1949). To the effect that the control of liquor stores comes under the general police powers, see the above cited Georgia cases.

The City of Atlanta gains its power to place its districts into effect by ordinance through the general powers granted municipalities in the above quoted Act and its Charter powers as cited herein. It is respectfully contended that the law as to zoning is not applicable in this case and it has been so held in other jurisdictions. We have found no case where the contrary has been held.

Moore v. *McCarver,* 240 SW 2d 443 at 445 (1951) states "(The) ordinance was not intended to be and it was not in any sense a zoning ordinance within the meaning of Arts. 1011a-1011j of Vernon's Texas Civil Statutes. Since the purpose and intent of the Texas Zoning Law is entirely different from that of the Texas Liquor Control Act, the former being general and the latter special in nature and neither having any direct relation to the other, it is our opinion that the ordinance regulating the sale of beer as passed by the governing body of the City of Hearn on September 12, 1950 was and is valid and enforceable, notwithstanding the procedure outlined in Arts. 1011a-1011j of Vernon's Texas Civil Statutes."

In the case of *Primm* v. *City of Reno,* 252 P. 2d 835 at 839 (1953), it was held: "It should in any event at least be clear that the regulation of land by zoning does not *preclude* and is not *inconsistent* with independent regulatory limitation or distribution of businesses pursuant to independent statutory authority." Also, see *Ellis* v. *City of Winter Haven,* 60 So. 2d 620 at 622 (1952).

In the *Ellis case* cited above, proceedings were brought

against the City to contest its authority to adopt an ordinance prohibiting the sale of non-intoxicating beer for consumption on the premises without following the procedure prescribed in special zoning law applicable only to the City, and it was held: "City had authority under the State Beverage Act to enact the ordinance and was not required to follow the procedure of the special zoning law."

9 A.L.R. 2d 878, Section 2 holds: "It is generally recognized that traffic in intoxicating liquor bears such a substantial relation to the public health, safety, morals, and welfare as to make the restriction thereof to *designated zones or districts* a proper subject for governmental regulations under the *police power,* and regulations duly enacted for such purpose by properly authorized governmental agencies have been sustained in so far as they are reasonable and not unjustly discriminatory."

Grumbach v. *Lelande,* 154 Cal. 579; 98 P. 1059 (1908)

State ex rel. Simpson v. *Ackerly,* 69 Fla. 23; 67 So. 232 (1915).

In the case of *Garonzik* v. *State,* 50 Tex. Crim. 533, 100 SW 374 (1907) and *Andreas* v. *City of Beaumont,* 51 Tex. Civ. App. 625; 113 SW 614 (1908), it was held: "Municipal liquor zoning regulations adopted pursuant to legislative authorization have in several instances been held not to be invalid as conflicting with the provisions of state statutes relating to the sale of intoxicating liquors within municipalities."

Further, it was held in the *Garonzik case* cited above, as follows: "The designation of localities where the sale

of intoxicating liquor is inhibited is not prohibition *but regulation of the sale.*"

In *Wessington* v. *Matejka,* 34 S.D. 408; 148 NW 847 (1914), it was held: "A municipality may prohibit the sale of intoxicating liquors within a restricted zone or district thereof only by an ordinance of uniform operation."

It is contended by the City of Atlanta that the subject liquor ordinance is obviously, by a simple reading thereof, of uniform operation throughout the entire City and that the same prohibits the sale of intoxicating liquors within restricted zones or districts thereof and this particular liquor ordinance is certainly in conformity with the decisions above quoted.

It seems well established law that the mere fact that the sale of intoxicating liquor, or other traffic therein, is permitted in some zones or districts while it is prohibited in others does not of itself constitute an unconstitutional discrimination against persons residing or property located in the latter. In this connection, we cite:

Richter v. *Lightston,* 161 Cal. 260; 118 P. 790 (1911);

State ex rel. Simpson v. *Ackerly,* 69 Fla. 23; 67 So. 232 (1915);

Morrison v. *Cregier,* 138 Ill. 401; 28 NE 812 (1891);

Madison v. *Maryville,* 173 Tenn. 489 (1938).

It was held in the case of *Alexander* v. *Graves,* 173 So. 417 (1937), "The state may confer on municipalities

power to prohibit the sale of intoxicating liquor in certain areas or places."

In the case of *Alamogordo Improvement Company* v. *Prendergast,* 109 P. 2d 254; 45 N.M. 40 (1940), it was held "Such regulations may be promulgated *under the municipal police power.*"

It was held in the cases of *State ex rel. Floyd* v. *Noel,* 169 So. 549; 124 Fla. 825 (1936) and *Great Atlantic & Pacific Tea Company* v. *Mayor of Danville,* 11 NE 2d 388; 367 Ill. 310; 113 A.L.R. 1386 (1937) as follows: "Such regulations may be promulgated by virtue of specific power to regulate the sale of intoxicating liquors."

In the case of *Alexander* v. *Graves,* supra, 178 Miss. 583 (1937), it was further held: "Municipalities are of necessity vested with broad discretion in establishing prohibited areas or places."

In the case of *Tritico* v. *Texas Liquor Control Board,* 126 SW 2d 738; 133 Texas 388 (1939) it was held: "In the exercise of their power, ordinances will be sustained unless the action complained of was arbitrary, unreasonable, and a clear abuse of power."

It was held in the case of *Midwest Beverage Co.* v. *Gates,* 61 F. Supp. 688 (1945), as well as in the case of *Owens* v. *Rutherford,* supra; 36 SE 2d 309, "Authority to license may be predicated on a delegation of police powers."

In the case of *Campbell* v. *City of Thomasville,* 6 Ga. App. 212, hn. 4 (1909), it was held: "The selling of 'near beer' is a business which, from its very nature, admits of strict regulation under the police power. It stands legitimately in a different class from the business

of selling drugs, soda water, and similar liquids. Regulations may be upheld as applied to this occupation which would be arbitrary and unreasonable if there were an attempt to apply them to other businesses.

"The municipal governing body may legitimately refuse to grant a permit to sell at a place within the designated limits, where, for some special reason, it should appear that the sale in that particular place or building would be subversive of those objects which municipal government is designed to protect.

"It is a reasonable regulation that every one who engages in the selling of 'near beer' in a municipality shall give a good and solvent bond, conditioned that he will keep an orderly house, will not violate the State liquor laws, and will obey the municipal ordinances of the city, regulating the business."

In the case of *McKown* v. *Atlanta,* 184 Ga. 221; 190 SE 571 (1937), the further principle of law was held: "The business of selling at retail malt beverages in a city of this State, from its nature, admits of strict regulation under the police power, and is different from the business of selling drugs, sodas, etc."

At this point, we desire to reiterate that the position of the City of Atlanta is that it can prohibit the sale of intoxicating liquors in certain areas or places *under the police power granted to it by the State* and, further, that the sale of intoxicating beverages, from its nature, admits of strict regulation *under the police power,* as stated in the *McKown case.* Clearly the instant case is analogous with the case of *McKown* v. *Atlanta* cited above.

Obviously, under the decisions of the above cited case,

the laws pertaining to the Planning and Zoning Commission are not applicable as liquor falls into a different classification from its very nature and admits of strict regulation under the police power.

What may or might be the size of buildings, the types of buildings, the kinds of dwellings, whether or not a filling station can be placed next door to a $100,000 home on Paces Ferry Road are entirely different zoning matters as contrasted with regulations dealing with liquor. The cases cited clearly spell out the rights and powers under which the City properly acted.

The City's position is to the effect that it has Charter police power and, in addition thereto, statutory power applicable to all cities to regulate the places where liquor stores shall exist. It is contended that the location of these stores by districts is not the form of zoning that is contemplated by the general law of zoning. There is no Georgia case to the contrary. The above cases of *Moore* v. *McCarver, Primm* v. *City of Reno, Ellis* v. *City of Winter Haven,* supra, involve like powers and in each instance it was held such districting was not the zoning contemplated by the zoning laws of those states, which were comparable to the zoning laws of Georgia, in requiring certain acts to be done before the zoning became law.

The Defendant submits the following question as being the primary issue raised on the general demurrer as to Count Two of the Plaintiff's petition:

> Can the non-conforming use portion of the ordinance (Section 53) be implemented where the petition affirmatively shows that the petitioner had no

legal right to operate a retail package store as a result of State revocation of the license?

COUNT TWO of the petition seeks to have Section 53 of said described liquor ordinance implemented to the extent that the plaintiff's store will qualify as a non-conforming use.

It is contended that the Court in the construction of the general demurrer must consider the all important fact that the State Revenue Commissioner of the State of Georgia revoked the retail liquor license of Plaza Liquor Store, Inc. on September 23, 1963.

Dealing with Count Two of the plaintiff's petition, specific reference is made to Section 53 of the ordinance in question which is quoted as follows:

> "Where retail liquor store exists on the effective date of this ordinance in an area outside of a package store area, the same may be continued as a non-conforming use of such area; provided, however, that no such non-conforming use shall in any way be expanded or extended either on the same or adjoining property. If such non-conforming use of such an area or any portion thereof is *discontinued or changed*, it will revert back to its zoning class and shall not be a package liquor area." (Emphasis supplied.)

As pointed out under the pleadings set forth in this case, the State liquor license was revoked on September 23, 1963.

It is the basic contention of the City of Atlanta that it is impossible to have a "retail liquor store" without a license holder. The license having been revoked, the use

is discontinued, and quite clearly so, as the same has reverted. The following language was used in the case of *Home Insurance Company of New York* v. *City Council of Augusta,* 50 Ga. 530 at 537 (1874): "A license is a right granted by some competent authority to do an act which, without such license, would be illegal." Therefore, a license is the only method by which a certain otherwise illegal function might be performed. *Raines* v. *The State,* 96 Ga. App. 727 (1957).

It is the City of Atlanta's position that logically it must follow that after the plaintiff's license was revoked, it had no "retail liquor store" because it was physically and legally unable to offer retail liquor for sale to the general public. Not being able to sell liquor to the general public left no non-conforming store. It was discontinued. At best, all that the plaintiff had was a commercial building.

The value of a liquor store is different from the value of other types of businesses. The value of a liquor store is a license to operate. Title 58 of the Georgia Code, as to Intoxicating Liquors, refers to the word "license." In most of the Code Section thereunder, it is required that a license be displayed prominently at all times, that the license fees be paid in advance, that no business license under this Chapter shall be granted to places too close to schools or churches, and that licenses which may be issued under the authority of this Chapter shall be as set forth in Acts 1937 - 38, Ex. Sess., pp. 103, 110, 111, and it is required that a municipal or county license has to be exhibited before a license shall be granted by the Revenue Commissioner. There is no liquor business without an appropriate license. (We re-emphasize the

fact that petitioner's license was revoked, as pled in his petition.)

We also wish to call to the Court's attention, the case of *Troutman* v. *Aiken,* 213 Ga. 55 at 56 (1957) wherein it was held: "Where, as here, a rezoning ordinance provides 'any nonconforming use of land existing on the effective date of this resolution may be continued provided, however, that no such nonconforming use of land shall in any way be extended, either on the same or adjoining property,' it is incumbent upon one seeking to use the property for a non-conforming use after the rezoning ordinance to show that his prior use of the property was legal and not unlawful." *(62 C.J.S. 497 at 226* and *117 A.L.R. 1140.)*

C. The decision is clearly correct.

Clearly, as the Court below observed: "The allegations of Count One do not show that the plaintiff was denied due process."

"Since this Count did not state a cause of action for any of the relief sought, the general demurrer addressed to it was properly sustained."

Further, as the Court below observed: "Count Two is based on the plaintiff's contention that the use of its premises for retail liquor sales should be permitted to continue as a non-conforming use under the ordinance. However, the plaintiff failed to qualify for this use. It alleged that in September, 1963, the State Revenue Commissioner revoked its retail liquor license and that 'since that time plaintiff corporation had not been licensed to conduct a retail liquor store' on its premises.

"Since it had no license, and thus could not make sales

to the public, the plaintiff was not an existing retail liquor store on the effective date of the ordinance and therefore does not come within the terms of Section 53 as to permissible non-conforming use."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the United States Supreme Court, hereby certifies that a copy of the within Brief for Respondent in Opposition was served upon Mr. Robert L. Mitchell, Attorney of record for Plaza Liquor Store, Inc., by depositing a copy of same in the United States Mail, properly franked to his address of record, 701 William-Oliver Building, Atlanta, Georgia 30303.

This 23 day of April, 1965.

Martin McFarland

MARTIN MCFARLAND, Attorney

"APPENDIX A"

PLAZA LIQUOR STORE, INC.

V.

CITY OF ATLANTA

CASE NO. B-6638

FULTON SUPERIOR COURT

ORDER

The defendant's general demurrer as renewed to Counts one and two of the plaintiff's petition as amended by plaintiff's first and second amendment having come on before this Court for a hearing and argument and briefs of attorneys for both parties having been heard thereon and considered, it is hereby ORDERED and ADJUDGED that said general demurrers as renewed to Counts one and two be and the same are hereby sustained and the plaintiff's said petition as amended is hereby dismissed.

This October 27, 1964.

JEPTHA C. TANKSLEY,

Judge, Superior Court

Atlanta Judicial Circuit

"APPENDIX B"

706

Decided: Feb. 4, 1965

In the Supreme Court of Georgia

22778. PLAZA LIQUOR STORE, INC. v. CITY OF ATLANTA.

1. Count 1 failed to allege a cause of action against interference with the use of plaintiff's premises as a retail liquor store since the ordinance under which the city acted was authorized by the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Ga. L. 1937-38, Ex. Sess., p. 103) and by the city's charter police power (Ga. L. 1874, p. 116).

2. Count 2 did not state a cause of action for the continued use of plaintiff's premises as a retail liquor store under section 53 of such ordinance because the plaintiff was not an existing retail liquor store on the effective date of the ordinance so as to come within that section.

GRICE, Justice. The petition of a corporate liquor store, seeking to enjoin a city from interfering with the use of its property for liquor store purposes was held subject to the city's general demurrers and was dismissed, thus bringing about this review. Plaza Liquor Store, Inc., filed such petition against the City of Atlanta in the Superior Court of Fulton County.

Count 1, insofar as material here, made the following allegations. The plaintiff owns real estate which has been zoned and used for the past six years as a retail liquor store. The defendant city in March 1964 enacted an or-

dinance, copy attached, purporting to zone certain real estate as "Package Store Areas," which, under such ordinance, are the only places where retail liquors may be sold. Although the plaintiff existed on the effective date of the ordinance and met all criteria established thereby, it was not included in the package store areas provided by the ordinance. Also, the city refuses to treat the plaintiff as a non-conforming use under such ordinance and will not permit it to sell or lease its premises for the sale of retail liquors because it was not included in such package store areas. The city, by its enactment and interpretation of said ordinance, is interfering with plaintiff's use of its property and is diminishing its value in specified amounts.

The plaintiff has suffered and will continue to suffer irreparable injury unless the city is enjoined and unless designated sections of the ordinances are declared null and void. The city enacted such ordinance without providing the plaintiff any notice or opportunity to be heard, in violation of the due process clauses of the State and Federal Constitutions and without complying with the requirements of two State zoning statutes (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). The city, by enacting this ordinance, is attempting to zone and alter the use of plaintiff's premises without authority of law.

The prayers included injunctive relief against the illegal zoning of plaintiff's property so as to prohibit the retail sale of liquors thereon and against interference with plaintiff's right to lease its premises for such purpose; declaration that specified provisions of the ordinance are null and void; and restoration of plaintiff's property to its prior zoning status.

Count 2 adopted the allegations of count 1 as to plaintiff's property, the city's enactment of the 1964 ordinance, the omission of plaintiff from the package store areas of such ordinance, the city's refusal to treat plaintiff as a non-conforming use or to allow it to sell or lease its premises for liquor store purposes, the city's continued interference with plaintiff's use of its own property, the diminishing value of its property due to such interference and the need for injunctive relief. In addition, count 2 alleged that the use of the plaintiff's property for retail liquor sales should be permitted to continue as a non-conforming use under such ordinance, but the city arbitrarily and illegally refuses to do so; and that in September 1963 the State Revenue Commissioner revoked the plaintiff's retail liquor license and since that time the plaintiff has not been licensed to conduct a retail liquor store on its premises. The prayers of this count included injunctive relief against the city's interference with the sale or lease of the plaintiff's property for use as a retail liquor store.

1. As we construe it, count 1 asserts that the ordinance, particularly sections 1, 2, 3, 4, 37, 53, 54 and 59, is void because the city failed to comply with the requirements of two State statutes pertaining to the zoning of property (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). However, zoning statutes are not applicable here.

What is applicable is the authority given the municipalities of this state to regulate the retail sale of liquor within their boundaries.

The Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Ga. L. 1937-38, Ex. Sess., p. 103) provides as follows: "Nothing in this Act shall

be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Act. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them." § 9(c), p. 111; *Code Ann.* § 58-1028.

The charter of the City of Atlanta gives the city "full power and authority to pass all by-laws and ordinances respecting . . . and every other by-law, regulation and ordinance that may seem to them proper for the security, for the peace, health, order and good government of said city." Ga. L. 1874, pp. 116, 119, § 15.

It was in accordance with this authority, granted the city in its charter and reaffirmed by the Revenue Tax Act, that the City of Atlanta enacted the 1964 ordinance, entitled "An ordinance to regulate the licensing and control of retail dealers in spirituous liquors; collection of revenues therefrom; and for other purposes."

This ordinance is not invalid for any reason assigned. Each provision is germane to and in furtherance of the regulation of the liquor business and the determination of the location of retail liquor stores within the city. As to the sections specifically attacked, section 1 states as the purposes of the ordinance the regulation and control of the licensing and sale of spirituous liquors so as to promote the health and general welfare of the community; sections 2, 3, 4 and 37 restrict licensing to the package store areas established thereby or subsequently changed and provide the procedure for such change; sec-

tion 53 permits the continuance of existing stores outside the package store areas as a non-conforming use; section 54 restricts the granting of licenses in the package store areas to those locations zoned as commercial or industrial under the zoning laws of the city; and section 59 prohibits successive license applications except those emanating from package store areas.

The allegations of this count do not show that the plaintiff was denied due process.

Since this count did not state a cause of action for any of the relief sought, the general demurrer addressed to it was properly sustained.

2. Count 2 is based upon the plaintiff's contention that the use of its premises for retail liquor sales should be permitted to continue as a non-conforming use under the ordinance.

It bases this claim upon section 53, which provides that "Where [a] retail liquor store exists on the effective date of this ordinance [March 23, 1964] in an area outside of a package store area, the same may be continued as a non-conforming use of such an area . . ."

However, the plaintiff failed to qualify for this use. It alleged that in September 1963 the State Revenue Commissioner *revoked* its retail liquor license and that "since that time plaintiff corporation has not been licensed to conduct a retail liquor store . . ." on its premises. Since it had no license, and thus could not make sales to the public, the plaintiff was not an existing retail liquor store on the effective date of the ordinance and therefore does not come within the terms of section 53 as to permissible non-conforming use. Compare *Troutman* v. *Aiken*, 213 Ga. 55, 56 (96 SE 2d 585).

The trial court properly sustained the general demurrer to this count.

Since the dismissal of the petition upon these demurrers was correct, the judgment is

Affirmed. All the Justices concur.

"APPENDIX C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,
Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(January 7, 1964.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, JR., District Judge.

TUTTLE, Chief Judge: Appellant Mrs. Hornsby is an unsuccessful applicant for a license to operate a retail liquor store in Atlanta, Georgia. She brings this action under 28 U.S.C. §1343[1] to redress an alleged deprivation

[1] § 1343 "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

of civil rights and under 28 U.S.C. §2201 to obtain a declaration of her rights. The Mayor, the City Clerk, and the Aldermen of Atlanta are defendants. In her complaint, Mrs. Horrsby alleges that although she met all the requirements and qualifications, as to moral character of the applicant and proposed location of the store, prescribed for the holder of a retail liquor dealer's license, her application was denied "without a reason therefor" by the Mayor and Board of Aldermen. This action is characterized as "arbitrary, unreasonable, unjust, capricious, discriminatory" and in contravention of the due process and equal protection clauses of the 14th Amendment. The complaint also charges that a system of ward courtesy was followed in the issuance of liquor licenses; under this system licenses allegedly would be granted only upon the approval of one or both of the aldermen of the ward in which the store was to be located. This too is said to constitute a violation of the 14th Amendment.

The defendants' motion to dismiss was granted by the court below on the ground that the complaint only concerned a political question which was not covered by the due process provisions of the 14th Amendment, since dealing solely with motives of a legislative body in voting upon legislation, and which did not draw into question the equal protection clause, since there was no allegation of discrimination. The court indicated that the issuance of a liquor license was within the discretion of the Mayor and the Board of Aldermen and concluded that a federal court had no jurisdiction to entertain an attack on that process.

At the outset, we note our disagreement with the dis-

trict court's classification of the challenged actions as purely those of a legislative body; we do not conceive the denial of an application for a license to be an act of legislation. Although there is disagreement on the matter, see 73 C.J.S., Public Administrative Bodies and Procedures, § 71, at 398, we prefer the view that licensing proper is an adjudicative process. Thus when a municipal or other governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with the prescribed standards for the award of that license. Similarly, the denial of a license is based on an adjudication that the applicant has not satisfied those qualifications and requirements. On the other hand, the prescription of standards which must be met to obtain a license is legislation, since these standards are authoritative guides for future conduct derived from an assessment of the needs of the community. (A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.)

Since licensing consists in the determination of factual issues and the application of legal criteria to them — a judicial act — the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see *Tadano* v. *Manney*, 169 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941). Although strict adherence to the common-law rules of evidence at the

hearing is not required, see *Crowell* v. *Benson,* 285 U. S. 22, 48 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, *Morgan* v. *United States,* 304 U. S. 1 (1938), to present evidence to support their contentions, see *id.* at 18, and to cross-examine witnesses for the other side, *Reilly* v. *Pinkus,* 338 U. S. 269 (1949). Thus it is not proper to admit *ex parte* evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party. *Southern Stevedoring Co.* v. *Voris,* 190 F. 2d 275 (5th Cir. 1951); see *Chin Quong Mew* v. *Tillinghast,* 30 F. 2d 684 (1st Cir. 1929). A *fortiori,* the deciding authority may not base its decision on evidence which has not been specifically brought before it, *United States* v. *Abilene & So. Ry.,* 265 U. S. 274 (1924); the findings must conform to the evidence adduced at the hearing, *Tadano* v. *Manney,* 160 F. 2d 665 (9th Cir. 1947). Furthermore, the Supreme Court has said that an administrative order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . There must be a responsible finding." *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943). Thus where the Secretary of State indicated that passport regulations precluded the issuance of a passport to the applicant in question, but did not specify the applicable subsection or set out the findings on which the conclusion was based, it was held that factual findings would be required before the Secretary could deny the application. *Boudin* v. *Dulles,* 235 F. 2d 532 (D.C. Cir. 1956).

(Also, the Supreme Court has held that the arbitrary refusal to grant a license or permit to one group when other groups have obtained permits under similar cir-

cumstances constitutes a denial of equal protection of the law.) *Niemotko* v. *Maryland,* 340 U. S. 268 (1951) (alternative holding). Although this case raised the problem of freedom of religion, state action and hence, necessarily, the 14th Amendment were involved. The Court concluded that a "completely arbitrary and discriminatory refusal to grant" park permits sought by Jehovah's Witnesses constituted a denial of equal protection of the law where other religious organizations had customarily been allowed to use the park.

(The appellees here, however, seek to place liquor in a special category, and argue that since Georgia has declared a license to sell spirituous liquor to be a privilege, the licensing authority has an unreviewable discretion to grant or deny licenses. It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, see *Midwest Beverage Co.* v. *Gates,* 61 F. Supp. 688, 690 (N.D. Ind. 1945), but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion.) There is no suggestion here that Georgia has sought to declare the sale of retail liquor to be a public business which can be franchised by the state and treated as devoted to a public use, as the State of Oklahoma did with cotton ginning, see *Frost* v. *Corporation Commission,* 278 U. S. 515 (1929), and the State of Utah did with mining, see *Strickley* v. *Highland Bay Mining Co.,* 200 U. S. 527 (1906). (To the contrary, the State of Georgia has limited municipalities in the exercise of their authority over liquor businesses to those

reasonable rules and regulations which fall within their police powers.)

Next, we note that states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, see *State Bd. of Equalization* v. *Young's Mkt. Co.*, 299 U. S. 59 (1936), the Amendment does not confer any other powers, see *Sancho* v. *Corona Brewing Corp.*, 89 F. 2d 479 (1st Cir. 1937). "[T]he Twenty-First Amendment did not clothe the State's right to control the sale of liquor with any higher degree than it had over the sale of other commodities within the State." *Brown* v. *Jatros*, 55 F. Supp. 542, 544 (E.D. Mich. 1944).

Neither is the assertion that liquor may be a menace to public health and welfare a sufficient answer to Mrs. Hornsby's allegations. The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards. Indeed, the great social interest in the liquor industry makes an exceptionally strong case for adherence to proper procedures and access to judicial review in licensing the retail sale of liquor. The possibility of high profits on the one hand and the danger of strict governmental limitations on the other hand cre-

ate a fertile breeding ground for the temptations of graft, corruption, and other abuses of governmental office. (If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.) See *Francis* v. *Fitzpatrick*, 129 Conn. 619, 30 A. 2d 552; *Glicker* v. *Michigan Liquor Control Commission*, 6 Cir., 160 F. 2d 96.

The closest case on point we have discovered is *Glicker v. Michigan Liquor Control Commission, supra.* There an action was brought under the Civil Rights Act for an order requiring the state liquor commission to renew a license which had allegedly been revoked as an intentional and deliberate discrimination motivated by political considerations. The trial court dismissed the complaint for failure to state a cause of action, but the Court of Appeals for the Sixth Circuit reversed, holding that a valid claim was stated under the equal protection clause and the substantive provisions of the Civil Rights Act, 42 U.S.C.A. 1983. (We see no valid distinction between the revocation of a license, as in *Glicker*, and the denial of an application, as in the case at hand. An applicant for a license has the right to be treated in the same manner as prior, successful applicants are.) See *Niemotko* v. *Maryland, supra.* Compare *Ashbacker Radio Corp.* v. *FCC*, 326 U. S. 327 (1945).

(We find in this case that Mrs. Hornsby's allegations, if borne out by the evidence, are sufficient to show a violation of her 14th Amendment rights. If her application actually was denied because the delegation from her ward decided, from their own knowledge of the circumstances, that Mrs. Hornsby should not be issued a liquor license, then she was deprived of the hearing which due process requires, since she could not discover the claims of those opposing her and subject their evidence to cross-examination. In addition, Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license. Next, the alleged failure of the board to reveal the basis for denying her application would, if true, be a denial of her right to have the board make findings based on the evidence adduced at a hearing. Moreover, appellees themselves indicate that the mandates of equal protection were not observed in the awarding of liquor licenses: "[I]n granting a mere privilege, appellant cites no authority which would prevent the defendants [appellees] from arbitrarily accepting one eligible application while denying others; otherwise they would, of necessity, be forced to grant licenses to every eligible citizen upon application." Brief for Appellees, p. 7. If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified.)

Merely showing a violation of a constitutional right is, however, not sufficient to gain access to the federal

courts; since Mrs. Hornsby has not sought to invoke jurisdiction under the federal question provision, 28 U.S.C.A. § 1331, we must determine whether she has alleged an actionable claim under the Civil Rights Act, Revised Stats. § 1979, 42 U.S.C.A. § 1983, within the jurisdiction of the district court, 28 U.S.C.A. § 1343 (3). The coverage of the Civil Rights Act has long been the subject of heated controversy. Courts have been reluctant to allow what they consider simple state actions for false imprisonment and assault and battery to be brought in the federal courts as civil rights actions. See *Monroe* v. *Pape,* 365 U. S. 167, 240 n. 68 (1961) (opinion of Frankfurter, J.). Also, they have been very strict in requiring that a complaint set forth *facts* showing a denial of the protected rights and not merely "factually unsupported characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights." See *McGuire* v. *Todd,* 198 F. 2d 60 (5th Cir.), *cert. denied,* 344 U. S. 835 (1952). Furthermore, at one time various limitations were propounded on the specific rights protected by the statutes — see *Agnew* v. *City of Compton,* 239 F. 2d 226, 231 (9th Cir. 1956), *cert. denied,* 353 U. S. 959 (1957) (due process apparently not protected absent allegation of discrimination between persons); *Ortega* v. *Ragen,* 216 F. 2d 561 (7th Cir. 1954), *cert. denied,* 349 U. S. 940 (1955) (no action allowed for denial of equal protection — on the degree of state action required — see *Screws* v. *United States,* 325 U. S. 91, 142 (1945) (dissenting opinion) (civil rights statutes inapplicable where act a violation of state law) — and on the types of discrimination covered — see *Snowden* v. *Hughes,* 321 U. S. 1 (1944) (intentional or purposeful

discrimination required in equal protection case); *Deloach* v. *Rogers*, 268 F. 2d 928 (5th Cir. 1959) (only discrimination based on class or race actionable).

The trend of the recent cases, however, has been to accept more and more actions under the civil rights statutes. Thus suits have been allowed for damages for intimidating a prisoner and interfering with his right to counsel, *Lewis* v. *Brautigam*, 227 F. 2d 124 (5th Cir. 1955); for damages resulting from an illegal search and seizure and police brutality, *Geach* v. *Moynahan*, 207 F. 2d 714 (7th Cir. 1953), *Davis* v. *Turner*, 197 F. 2d 847 (5th Cir. 1952); for an injunction against enforcement of ordinances regulating the operation of taxicabs, *Walton* v. *City of Atlanta*, 181 F. 2d 693 (5th Cir.), *cert. denied*, 340 U. S. 823 (1950) (judgment for defendants on merits); and for damages to one barred from Las Vegas casinos as an undesirable character, *Marshall* v. *Sawyer*, 301 F. 2d 639 (9th Cir. 1962). The Supreme Court, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), gave the ultimate seal of approval to a construction of section 1983 not requiring an allegation of a purpose to discriminate. See *Cohen* v. *Norris*, 300 F. 2d 24, 29-30 (9th Cir. 1962) (overruling *Agnew* v. *City of Compton*, *supra*, and other cases). *Monroe* v. *Pape* upheld a complaint alleging damages from an illegal search and seizure under color of state and municipal statutes, customs and usages but not with any specific intent. *Accord*, *Egan* v. *City of Aurora*, 365 U. S. 514 (1961). It is, therefore, now recognized that no specific intent to deprive a plaintiff of his civil rights need be alleged, see *Stringer* v. *Dilger*, 313 F. 2d 536, 540 (10th Cir. 1963), and that an intentional and purposeful discrimination is necessary only under the act's criminal sections, see *Monroe* v. *Pape*,

supra at 187, or under the conspiracy provisions, see *Lewis* v. *Brautigam, supra* at 127-28.

Moreover, the case of *Baker* v. *Carr,* 369 U. S. 186 (1962), may have relaxed the requirements announced in *Snowden* v. *Hughes, supra,* for equal protection cases. Jurisdiction in *Baker* v. *Carr,* rested in part on section 1343 (3), and the Court expressly upheld jurisdiction. But the gist of the complaint was merely a denial of equal protection through gradual shifts in population, although it was alleged that the original 1901 apportionment was arbitrary and capricious. Hence it is at least doubtful that an allegation of an intentional and purposeful discrimination is necessary to sustain civil rights jurisdiction, even where founded on a denial of equal protection.

Judging Mrs. Hornsby's complaint in the light of the requirements that it set forth (1) that plaintiff has been denied a protected right, privilege or immunity, and (2) that defendants acted under color of a state or local law, see *Stringer* v. *Dilger, supra* at 540, *Marshall* v. *Sawyer, supra* at 646, we find she has set forth an actionable claim within the jurisdiction of the district court. (We have already concluded that Mrs. Hornsby alleged denial of her 14th Amendment rights. That this was done under the color of state law is too plain to merit extended discussion. Mrs. Hornsby was denied a liquor license by the Board of Aldermen, acting under the authority of the Ga. Code Ann. §§ 58-1031-103, to pass on the fitness of applicants and issue licenses. Moreover, the Board of Aldermen, functioning as an agency of the state under Ga. Code Ann. § 58-1028, had the right to adopt rules and regulations for liquor businesses, and to determine the location of retail stores.)

The proper question to be determined upon the hearing of this case in the district court is not whether the plaintiff below is entitled under the law to a liquor license. The determination of whether she should be granted one is a function of the Aldermanic Board. The role of the courts is to ascertain whether the manner in which this determination was or is made accords with constitutional standards of due process and equal protection. We are of the opinion that the complaint alleged sufficient facts to show that the denial of appellant's application for a license did not meet these standards and, since done under color of state statute, constituted a violation of 42 U.S.C. § 1983.

It follows that the trial court must entertain the suit and determine the truth of the allegations. (If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field.)

The judgment is REVERSED.

JONES, Circuit Judge, dissenting:

With some of the Court's opinion I am in disagreement. Some of the Court's opinion I do not understand.

The Court's opinion, as I read it, decides that the refusal to give Mrs. Hornsby a liquor license is not legislative, but adjudicative and therefore judicial. These statements are not essential to the decision and may be misleading in the consideration of some future case.

I see no necessity of extending federal civil rights jurisdiction to the review of state administrative decisions where it is asserted that irreparable injury has resulted from arbitrary action of a state administrative agency in violation of due process and declaratory and injunctive relief is sought. In such cases federal jurisdiction seems to be established without any civil rights controversy. 3 Davis, Administrative Law Treatise 310 et seq. § 23.05.

The Court directs the district court upon finding that the allegations of the complaint are true, to "enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided." This is not a class action, and if the Court is going to prescribe the remedy that the district court shall grant, might it not be just as well to confine the relief to the appellant who seems to be the only person now complaining?

It is not clear to me why the Court does not direct the district court, if it must give directions, to enjoin the issuance or renewal of licenses until standards are established and procedures provided. This sort of a directive would, so I think, be better than the one which the Court has adopted. (The order directed by the Court will, I fear, open the door to a flood of applications for licenses, none of which the appellees, under this decision, will be permitted to deny.)

"APPENDIX D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,

Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(April 3, 1964.)

ON MOTION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM: Appellees have filed a petition for rehearing in which they challenge our original holding and seek clarification of the principles involved.

As to the first contention the cases cited by appellees

to support the broad discretionary powers of liquor licensing authorities all stand for the proposition that local governmental bodies have great latitude in enacting reasonable standards and qualifications for those in the liquor business or seeking to engage in it. They do not say that the licensing authority can select those who are to receive licenses on the basis of uncontrolled discretion and whim, nor do they say that licensees can be selected without any established standards or in disregard of established standards. Thus, the cited case of *Thurlow* v. *Massachuseits,* 46 U. S. (5 How.) 504. involved the conviction of one who had sold liquor without a license. The appellant challenged the state statute which required a license to sell imported liquors in quantities less than 28 gallons. The statute was upheld and the conviction affirmed. It can be readily seen that the discretion upheld there was in the general limitation on the right to sell liquor; Thurlow was subjected to the same restrictions as all others in the state.

Furthermore, we cannot agree with appellees' contention that a liquor applicant is like a candidate for a state governmental office who has no rights secured by the United States Constitution. The liquor business is like any other business in that the state is limited in its regulation of it by due process and equal protection requirements although the peculiar nature of the business warrants the imposition of severe limitations on liquor traffic and tight restrictions on those persons engaged in it. In answer to appellees' suggestion that some rights, such as the right to practice law in a state court, are privileges not protected by the Constitution, we call attention to *Konigsberg* v. *State Bar,* 353 U. S. 252 (1957).

To deal with the requests for clarification next, we reiterate that the function of the trial court will not be to determine whether Mrs. Hornsby is entitled under the law to a liquor license; rather it is to ascertain if the manner in which it is determined whether she should be granted one accords with constitutional standards. This Court will not suggest how the determination should be made other than to point out that every applicant should be apprised of the qualifications necessary to obtain a license and should be afforded a reasonable opportunity to show that he does or does not meet them. If appellees fear that too many applicants are qualified under existing standards, then, we repeat, they may raise the standards of eligibility and fix limits on the number of licenses to be issued. If there are more applicants than licenses and all applicants are equally qualified to serve the general welfare, perhaps an unlikely event, then selection among them by lot or on the basis of the chronological order of application would meet constitutional requirements.

The motion for rehearing is DENIED.

JONES, Circuit Judge, I dissent.